87-739

Supreme Court, U.S.
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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1987

BOAT NIAGARA FALLS, INC.,
PETITIONER,

v.

FRANCISCO JOIA AND
JO-JA SERVICE CORP.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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October 30, 1987

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

The jury at the District Court trial assessed comparative fault in this seaman's personal injury action as follows:

The plaintiff —	5%
The co-defendant vessel owner/employee —	30%
An intervening joint tortfeasor co-defendant —	65%

The trial court entered judgment on the principle of joint and several liability vitiating the comparative jury finding.

The question presented is:

Whether the application of the Massachusetts' common law principle of joint and several liability affirmed by the First Circuit in an action commenced pursuant to the Jones Act (46 U.S.C. § 688) and the General Maritime Law conflicts with the reason and principle of *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) and creates a conflict with the principle of comparative negligence as applied by the Fifth, Eighth, and Eleventh Circuits.

List of All Parties.

All parties to this action appear in the caption of this Petition. There are no subsidiaries or affiliates.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts with regard to the application of joint and several liability was not reported. The opinion of the United States District Court for the District of Massachusetts can be found in the Appendix (A. 27a). The opinion of the United States Court of Appeals for the First Circuit is reported at *Joia* v. *Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987).

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on May 1, 1987 (A. 25a).

The judgment of the Court of Appeals for the First Circuit denying the Petition for Rehearing and Suggestion of Rehearing en banc was entered on June 17, 1987 (A. 26a). On September 10, 1987, the time for filing this petition was extended to October 30, 1987.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statute Involved.

The Jones Act, 46 U.S.C.S. Appx., Section 688(a) provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located.

Statement of the Case.

This is an action in tort for personal injury suffered by the Plaintiff, Francisco Joia on August 1, 1983, on the fishing vessel NIAGRA FALLS. The plaintiff's accident occurred when he slipped on hydraulic fluid which had overflowed onto the engine room floor when a Jo-Ja employee mistakenly filled the hydraulic tank with fresh water. Suit was commenced against co-defendants Jo-Ja Service Corp. and Boat Niagara Falls, Inc. on March 14, 1984 in the United States District Court for the District of Massachusetts.

Trial was held before Mazzone, J., and a jury. The plaintiff proceeded upon two counts against co-defendant, Boat Niagara Falls, Inc. and one count against co-defendant Jo-Ja Service Corp. Both Jo-Ja Service Corp. and Boat Niagara Falls, Inc. filed crossclaims against each other for indemnification. At the close of all the evidence, both defendants moved for directed verdicts on the plaintiff's Complaint which were denied.

The case was presented to the jury against Boat Niagara Falls, Inc. on counts alleging Jones Act negligence and unseaworthiness. The case presented to the jury against the defendant, Jo-Ja Service Corp. consisted of a single count alleging negligence in creating a dangerous condition on the F/V NIAGARA FALLS.

Instructions were submitted to the jury by the Court under comparative fault principles of maritime law. Accordingly, special questions were propounded to the jury to determine the plaintiff's and defendants' percentage of causal negligence.

The jury returned a verdict assessing liability for plaintiff's accident as follows:

Plaintiff, Francisco Joia	— 5%
Boat Niagara Falls, Inc.	— 30%
Jo-Ja Service Corp.	— 65%

The jury assessed plaintiff's damages in the total amount of $360,000.00 consisting of the following breakdown:

Pain and suffering	$250,036.00
Past Wages	44,000.00
Future Lost Earnings	65,964.00
Total Damages	$360,000.00

The jury also awarded prejudgment interest at the rate of 10%.

Subsequent to the verdict both defendants filed Motions for Judgment Notwithstanding the Verdict which were denied. The defendant Jo-Ja Service Corp. presented evidence on its affirmative defense of limitation of liability under 46 U.S.C. §§ 183 *et seq*. After a hearing, the trial judge granted limitation and permitted defendant Jo-Ja Service Corp. as operator of the waterboat to limit its liability to a stipulated figure of $50,000.00, the value of the water boat. Judgment was entered against defendant Boat Niagara Falls, Inc. in the amount of *$292,000.00 and prejudgment interest* from August 1, 1983 on past lost wages of $44,000.00 and the defendant Jo-Ja Service Corp. in the amount of *$50,000.00*. Following the trial court's denial of its Motions for Judgment Notwithstanding the Verdict and for a New Trial, defendant Boat Niagara Falls, Inc. timely filed its Notice of Appeal.

On appeal, the United States Court of Appeals for the First Circuit reversed the finding allowing limitation of liability as to Jo-Ja Service Corp. It affirmed the District Court's findings as to the application of joint liability as to Boat Niagara Falls' responsibility for the damages even though Boat Niagara Falls was only 30 percent at fault for plaintiff's injuries.

The First Circuit panel based its affirmance of the application of joint liability on two grounds: the application of Massachu-

setts common law and an interpretation of *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). The Court examined Massachusetts law despite the clear application of general maritime law to the facts of the case where the incident involved a traditional maritime activity on a vessel in navigable waters. The panel's interpretation of the *Reliable Transfer* case clearly ignored the express language of that opinion by stating, "Furthermore, there was no indication [in *Reliable Transfer*] that the comparative fault rule should apply to a situation other than a maritime collision or stranding." (A. 15a).

Jo-Ja Service Corp. has few assets of any value. Its protection and indemnity insurance coverage has a $50,000.00 limit. Therefore, the petitioner Jo-Ja Service Corp. is faced with having to pay far more than its proportionate share of the damages as assessed by the jury. Specifically, Boat Niagara Falls, Inc. is forced to pay all of the damages in excess of $50,000.00 even though it was found to be only 30% at fault.

Existence of Jurisdiction Below.

The United States District Court for the District of Massachusetts had jurisdiction over the tort claims of the respondent pursuant to the Jones Act, 46 U.S.C.S. Appx. Section 688 and 28 U.S.C. § 1333.

Reasons for Granting the Writ.

This Court should grant certiorari because the decision of the First Circuit is in direct conflict with the reason and principle of *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). The First Circuit decision also presents a principle as to which the Courts of Appeal are in conflict. *Leger* v. *Drilling*

Well Control, Inc., 592 F.2d 1246 (5th Cir. 1987), *Jovovich* v. *Desco Marine, Inc.*, 809 F.2d 1529 (11th Cir. 1987). The application of joint and several liability in cases brought by Jones Act seamen against two or more defendants would have dramatic consequences for the maritime industry.

I. The Decision Is in Direct Conflict with the Reason and Principle of *United States* v. *Reliable Transfer Co.*

This Court in *United States* v. *Reliable Transfer*, 421 U.S. 397 (1975) abandoned the admiralty rule of divided damages, whereby the amount of property damage in a maritime collision case is equally divided whenever two or more parties involved are found to be guilty of contributory fault regardless of the relative degree of their fault. The Court replaced the divided damages rule with a standard requiring liability for such damage to be allocated among the parties proportionately to the comparative degree of their fault. 421 U.S. at 411. This Court noted that "a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases." *Id.* at 409.

The First Circuit panel however, in its opinion of May 1, 1987, referring to *Reliable Transfer*, stated that "there was no indication in that the comparative fault rule should apply to a situation other than a maritime collision or stranding." (A. 15a.) This is directly contrary to the express language of the *Reliable Transfer* opinion.

The *Reliable Transfer* Court even noted that "in our own admiralty law a rule of comparative negligence has long been applied with no untoward difficulties in personal injury actions."

421 U.S. at 407, *citing Pope and Talbot* v. *Hawn*, 346 U.S. 406 (1953). Therefore, since the First Circuit's rationale for the application of joint and several liability was based on an erroneous reading of *Reliable Transfer*, the writ should be granted.

The panel's decision cited Massachusetts common law in support of its affirmance of the application of the doctrine of joint and several liability. However, it is clear that the panel should not have looked to Massachusetts common law as the alleged act of negligence occurred on the navigable waters of the United States. The plaintiff pleaded in his Complaint that his accident resulted from a traditional maritime activity and stated that the action was brought pursuant to the Jones Act and the General Maritime Law. The action therefore, is clearly within the scope of admiralty jurisdiction. *Executive Jet Aviation Co.* v. *City of Cleveland*, 409 U.S. 249 (1972). Under the Supremacy Clause, the federal maritime law rather than the state law must be applied. *The Lottawanna*, 21 Wall. 558, 22 L.Ed. 654 (1874); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

The comparative fault rule has been adopted in maritime personal injury actions and recognized by various circuits in maritime personal injury cases. *Harrison* v. *Flota Mercante Grancolombiana*, 577 F.2d 968 (5th Cir. 1979); *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, *vacated and remanded*, 451 U.S. 156, *reinstated*, 657 F.2d 25 (3d Cir. 1981); *Walsh* v. *Zuisei Kaiun*, 606 F.2d 259 (9th Cir. 1979); *Smith and Kelly Company* v. *S/S Concordia Tadj*, 718 F.2d 1022 (11th Cir. 1983).

The doctrine of joint and several liability is inimical to the application of a porportionate fault rule. *Bartlett* v. *New Mexico Welding Supply Inc.*, 646 P.2d 570, 586 (N.M. App. 1982). It is important to underscore that the doctrine of joint and several liability developed under the common law system of

contributory negligence where a plaintiff who was guilty of the slightest negligence was barred from recovery. The law balanced this possible inequity by allowing a plaintiff who was found to be legally pure because he was not even slightly negligent to collect his entire judgment from any defendant who was guilty of even slight negligence. *Laubach* v. *Morgan*, 588 P.2d 1071 (Okla. 1978), 14 Va. L. Rev. 677 (1927-28). Now that admiralty courts are able to determine degrees of fault, and a plaintiff can recover regardless of his own degree of fault, the doctrine of joint and several liability is no longer viable.

The First Circuit correctly noted that the decision of *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) is not controlling in the instant case. The holding of that decision is distinguished because of the unique remedial purpose of the Longshoreman's and Harbor Worker's Compensation Act and the "delicate balance between the statute and judge made law." *Id.* at 273. There is no such statute involved in the instant case.

II. The Decision of the First Circuit Is Contrary to the Decisions of the Fifth and the Eleventh Circuits.

If the First Circuit opinion of May 1, 1987 is allowed to stand, this holding will be in direct conflict to that of the Fifth Circuit and the Eleventh Circuit. In *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979) the Fifth Circuit explicitly adopted the rationale of *Reliable Transfer* in the application of comparative fault principles where one defendant has settled before trial. The *Leger* court extensively discussed the principles of *Reliable Transfer* and specifically held that a defendant should not pay more than its allocated share of liability. "The reasoning of *Reliable Transfer* loses none of its

cogency in the context of a non-collision personal injury case." *Id.* at 1251. This is directly opposite to the First Circuit's reasoning in the instant case.

The Eleventh Circuit has recently held in *Jovovich* v. *Desco Marine Inc.*, 809 F.2d 1529 (11th Cir. 1987) that in maritime cases, damages are to be apportioned according to fault. In *Jovovich*, the issue was whether a settling defendant in a personal injury action could seek indemnity from non-setting defendants where the settlement was greater than its proportionate share of liability. The court explicitly noted that in the Eleventh Circuit the guidelines of *Leger* apply "to all theories of maritime liability apportionment including indemnity and contribution." *Id.* at 1532. *See, Gormley* v. *Van Ingen*, 736 F.2d 624 (11th Cir. 1983).

Therefore, the First Circuit's opinion of May 1, 1987 is directly contrary to that of the Fifth and Eleventh Circuits. *See, SNCO Barge Lines* v. *Sun Transportation Co.*, 775 F.2d 221 (8th Cir. 1985). This opinion creates a conflict among the circuits and is inimical to the uniformity of maritime law which is of such vital national importance.

III. This Issue Is Strongly in Need of the Supreme Court's Voice.

The First Circuit opinion also states that the question of the viability of doctrine of joint and several liability is better left to the legislature. However, as this Court has stated, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald* v. *United States Lines*, 374 U.S. 16, 20 (1963), *quoted in Reliable Transfer*, 421 U.S. at 409.

If this decision is allowed to stand, a defendant in a maritime action will be responsible for all of a plaintiff's damages even

though it was only at fault in a small degree. This will have the practical effect of imposing a heavy financial burden on an already troubled industry.

Many states have abolished joint and several liability or severely modified the doctrine. Granelli, "The Attack on Joint and Several Liability," 71 ABA Journal 61 (July, 1985). New Hampshire, Vermont, Ohio, Kansas and New Mexico have abolished joint and several liability while Nevada, Texas, Indiana, Louisiana, Oregon, Pennsylvania, Iowa, Minnesota and Oklahoma have placed limitations on its application. *Id.* at 62. California has recently enacted a statute which drastically modifies joint liability. West's Ann. Cal. Civ. Code, Sections 1431 *et seq.*

This subject is very much in need of the Supreme Court's voice. This Court should address this matter which will have a large impact on the maritime field.

Conclusion.

The Petitioner prays that the Writ of Certiorari should properly be granted because the issue raised affects uniformity of maritime law in an industry where federal statutory and general maritime law control.

The impact of a return to state common law principles of joint and several liability will place seamen personal injury law in a state of confusion affecting all industries attempting to seek uniformity for the protection of this class of individual.

Respectfully submitted,

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October 30, 1987

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 85-1753

FRANCISCO JOIA,
Plaintiff, Appellee,

v.

JO-JA SERVICE CORP.,
Defendant, Appellee.

BOAT NIAGARA FALLS, INC.,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. A. David Mazzone, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Torruella, *Circuit Judge*,
and Pieras,* *District Judge*.

Thomas E. Clinton with whom *Clinton & Muzyka, P.C.* was on brief for appellant.

Thomas J. Hunt with whom *Law Offices of Thomas J. Hunt* was on brief for Francisco Joia.

Richard B. Kydd with whom *Michael F. Kuppens* and *Kneeland, Kydd & Handy* were on brief for Jo-Ja Service Corporation.

May 1, 1987

* Of the District of Puerto Rico, sitting by designation.

PIERAS, *District Judge*. This is a seamen's suit for personal injuries against the employer and a water boat who had a service contract with the employer. Plaintiff, Francisco Joia (hereinafter "Joia") brought two counts against his employer, Boat Niagara Falls, Inc. (hereinafter "Niagara"), the first under the Jones Act, 46 U.S.C. § 688 *et seq.*, and the second under the general maritime theory of unseaworthiness. Joia brought one count of common law negligence, a state law pendent claim, against co-defendant Jo-Ja Service Corporation,[1] the owner of the water boat, (hereinater "Jo-Ja"). Both co-defendants filed cross claims for contractual indemnity. The case was tried to a jury on plaintiff's counts, and it returned a verdict for plaintiff, finding Jo-Ja 65% negligent, Niagara 30% negligent, and plaintiff 5% negligent. The jury awarded plaintiff damages in the amount of $360,000.00, allocating $44,000.00 for past wages, $65,964.00 for lost future earnings, and $250,036.00 for pain and suffering. It also awarded prejudgment interest at the rate of 10%.

At the close of plaintiff's case, Niagara moved for a directed verdict, which was denied. Both codefendants filed motions for judgment notwithstanding the verdict, which were also denied. The district court heard Jo-Ja's motion for limitation of liability, and by memorandum and order of judgment the court limited Jo-Ja's liability to the stipulated value of its vessel, which was $50,000.00. It entered judgment for plaintiff in the amount of $342,000.00, $50,000.00 against Jo-Ja, and $292,000.00 against Niagara. The court allowed prejudgment interest on the $44,000.00 past lost wages from August 1, 1983, onward. The assigned errors we examine on appeal relate to the denials of the directed verdict and judgment n.o.v., the limitation of liability, joint and several liability, excessive damages, and the codefendant's cross claims.

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[1] The parties settled two counts relating to maintenance and cure, and a stipulation of dismissal as to these counts was filed on May 29, 1985.

I. *Factual Background*

On August 1, 1983, Joia was the engineer aboard the F/V NIAGARA FALLS, an eighty-foot-long steel hull stern dragger owned by Niagara. On that date it was docked in New Bedford, Massachusetts, having just returned from a fishing trip. At approximately 5:00 a.m., the water boat CHIPPY, owned by Jo-Ja, pulled alongside the F/V NIAGARA FALLS to fill its fresh water tank pursuant to a contract. The operator of the CHIPPY, Michael Mahoney, had previously filled the fresh water tank on the F/V NIAGARA FALLS approximately six to twelve times with no difficulty finding the water receptacle. However, on this date the operator mistakenly pumped approximately 200 to 300 gallons of water into its hydraulic oil fill. The hydraulic oil tank thus was over-filled causing a mixture of hydraulic fluid and water to overflow inside the boat. This fluid mix spilled onto the floor of the engine room. After realizing his mistake, the operator turned off the water and proceeded to fill the correct tank. Joia's claim of unseaworthiness against his employer was primarily based upon the lack of proper markings to identify the separate water and hydraulic oil fills.

Mahoney called his supervisor, Clifford Davignon, at about 6:30 a.m. and informed him of the accident. Davignon told the operator that he would take care of it. He arrived at the vessel at about 6:45 a.m. to find it locked. He contacted his employer, Thomas Thomas, at about 7:00 a.m., who instructed Davignon to clean the mess.

Meanwhile, at 9:00 a.m., Joia arrived to start the engine of the F/V NIAGARA FALLS. Joia walked partway down the ladder to the engine room and stopped when he saw water and oil all over the engine room floor. He watched from the ladder for about 10 to 15 minutes to determine the cause of the mess and then left the vessel to speak to the owners. He first spoke to co-owner, Joe Beatriz, who was unaware of the problem.

Joia told Beatriz that he needed a pump to pump the water out. Beatriz gave Joia no instructions. Joia then spoke with co-owner Tony Pimental, who told Joia to clean the engine room. Joia responded that he could not clean the engine room until he pumped out some of the water.

Joia, ordered by Joe Beatriz, purchased a pump at a supply store and returned to the vessel at 11:40 a.m. He stepped down the ladder and into the engine room with the pump, and saw that the water level on the floor had not changed. Joia knew from experience that the oil on the floor was hydraulic oil. As he walked through the oil and water on the deck, he slipped and fell. He sat on the deck for three or four minutes, got up and took his tools, and installed the pump. Shortly after his fall, a representative of Jo-Ja arrived on the vessel. Joia asked the representative what happened, who responded that he did not know. Joia then called his wife, who picked him up at the vessel and took him to a doctor. He suffered back injuries, and required the surgical removal of a hydrocele in his right testicle, as well as a laminectomy to remove a herniated disc.

II. *Directed Verdict and Motion for Judgment N.O.V.*

Niagara contends that the district court erred in denying both Niagara's motion for directed verdict and the motion for judgment notwithstanding the verdict. Its ground of support was that Joia breached his duty to his employer, Niagara, to maintain and keep clean the engine room on the F/V NIAGARA FALLS. The standard of review of a refusal to grant a directed verdict and a refusal to grant a judgment n.o.v. is the same. *De Mars* v. *Equitable Life Assur. Soc. of U.S.*, 610 F.2d 55, 57 (1st Cir. 1979). A verdict should be granted only where the evidence could lead reasonable men to but one conclusion, without evaluating the credibility of the witnesses or considering the weight of the evidence. *Id.* at 57. The appeals court must view the evidence most favorable to the nonmoving party

and give that party the benefit of all reasonable inference. *Id.* Because the standard of review is the same, we consider both motions together. With these axioms in mind, we now consider the district court's rulings.

Niagara argues the evidence shows that Joia is barred from recovery because his injuries resulted from a breach of his contractual duty to his employer, that of maintaining and cleaning the engine room, *citing Peymann* v. *Perini Corp.*, 507 F.2d 1318 (1st Cir. 1974), *cert. denied*, 421 U.S. 914, 95 S.Ct. 1572, 43 L.Ed.2d 780 (1975). In *Peymann*, the plaintiff was an engineer on the defendant shipowner's tug boat. While conducting an engine overhaul, plaintiff attempted to hook a chain fall overhead. In order to reach the hook, plaintiff was required to stand upon something to increase his height. He looked but could not find a ladder. Instead, he perched "like a bird" on an iron pipe rail, of which he knew oil constantly dripped on. He fell from his perch and was injured. The trial court directed a verdict for the defendant. The appeals court affirmed, stating that the jury could have found that it was plaintiff's primary duty to maintain the engine room in a seaworthy condition, and that stepping on the rail without wiping off the oil which was placed there by him, was his sole responsibility. *Peymann*, 507 F.2d at 1323. *Peymann* is distinguishable from the case at bar. In *Peymann*, the plaintiff was responsible for creating the condition which caused his injuries, whereas here, a third party over whom Joia had no control created the unseaworthy condition on the engine room deck of F/V NIAGARA FALLS. Joia testified that the maintenance of the engine room was his responsibility. Co-owner Pimental directed him to clean the mess, saying: "If you said this is a big old mess, you go clean it up." Joia responded that he needed to pump out some of the water in order to lower the oil level, otherwise, additional water would cause the oil to rise over the deck again. He then proceeded to install the

pump in the engine room, where he fell and suffered his injuries.

Furthermore, had his employer not given him directions, this might be a different case. Joia proceeded only under the general directions of his employer, where in *Peymann*, the plaintiff proceeded under his own directions. Indeed, under these circumstances, it would have seemed futile for Joia to have first attempted to clean the deck and then to pump the water, and foolish for his employer to have so directed. We cannot say that under *Peymann*, as a matter of law, Joia breached his duty to maintain a clean engine room. Joia was directed to clean this mess, understood his responsibility to maintain the engine room, and proceeded to remedy the problem in a manner he saw fit. This evidence could not lead reasonable men to one conclusion. It was for the jury to decide whether Joia proceeded in a reasonable manner, and it did decide, finding Joia 5% contributorily negligent.[2] We find that the district court properly denied Niagara's motions for directed verdict and judment on Joia's breach of duty to his employer.

III. *Charge to the Jury*

Niagara next argues that the district court committed prejudicial error in refusing to give its requested jury instructions

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[2] This case is somewhat similar to *Caddy* v. *Texaco, Inc.*, 363 Mass. 36, 292 N.E.2d 348 (1973). In *Caddy, supra*, a seamen was instructed to clean up oil and do some other work, but was not told in what order to proceed. The court held that his performing the other work first would only make him contributorily negligent, and not bar him from recovery. In *Peymann*, this court suggested that if the *Caddy* seaman had been instructed to clean the oil first, but instead performed the other work first, he might not recover from his injuries. 507 F.2d at 1323 n.2. Here Joia had to do two things, pump the water and clean the deck, though he was not instructed in what order. Joia did not disobey employer's orders, but proceeded to clean by pumping water first. While it may have been advisable, for instance, to place a plank over the deck, rather than wade through the oil and water, his manner of walking could only make him contributorily negligent.

regarding Joia's duty to his employer. The requested instructions dealt with the rule of *Peymann*, that is, if the jury found that the sole cause of Joia's injuries was his breach of duty to his employer, he is barred from recovery. That argument need not detain us long, for we have previously determined that the rule of *Peymann* is not applicable here.

While all parties are entitled to an adequate jury instruction upon the controlling issues, the court need not employ the precise language urged by any party. *Computer Identics Corp.* v. *Southern Pacific Co.*, 756 F.2d 200, 203-04 (1st Cir. 1985). Moreover, if the district court's instruction properly apprises the jury of the applicable law, the failure to give the exact instruction requested does not prejudice the objecting party. *McKinnon* v. *Skil Corp.*, 638 F.2d 270, 274 (1st Cir. 1981).

Our review of the jury instructions given regarding the duty issue shows that the district court adequately covered the applicable rules of law. In charging the jury, the district court instructed that the defendants were entitled to "rely upon him (Joia) to exercise reasonable care, knowledge and skill as an experienced person or as an experienced engineer." Moreover, the district court instructed more than once that the jury was to consider whether Joia's injuries were caused, in whole or in part, by his own negligence, and that the jury was to assign a percentage of any negligence committed by Joia and the defendants. The jury was instructed that it would assign a percentage of fault of 1 to 100 to either of the parties and that the total percentages must equal 100. Further, the jury was provided special verdict forms, which contained the names of the parties and a blank space after each for the assignment of percentages of negligence. Had the jury assigned 100 percent neligence to Joia, as it was told it could, a fortiori, Joia would have been denied recovery.

IV. *Limitation of Liability and Joint and Several Liability*

Both Niagara and Joia argue that the district court erred in limiting Jo-Ja's liability pursuant to 46 U.S.C. § 183. After the jury verdict, and upon motion of Jo-Ja, the court limited Jo-Ja's liability to the stipulated value of the vessel, CHIPPY, to be $50,000.00. The court then entered judgment against Niagara for $292,000.00 and against Jo-Ja for $50,000.00, for a total judgment of $342,000.00, stating that but for the limitation, judgment would be entered jointly and severally against both defendants for $342,000.00. The plaintiff was to bare the brunt of his 5% negligence, or, $18,000.00. Thus, while the jury assessed 30% fault on Niagara, that court adjudged the defendant approximately 81% liable; on the other hand, Jo-Ja, which was adjudged to have incurred 65% negligence, must pay a maximum of only 19% of the judgment.

But for the limitation of liability, the parties would be jointly and severally liable in the amount of $342,000.00 on the three counts. The issue of whether the district court should or should not have limited Jo-Ja's liability presents a second, more compelling issue. That is, whether the dollar value of the judgment against Niagara should exceed its proportionate share of fault. Niagara argues this court should adopt the proportionate fault rule, and abolish joint and several liability in this context. Because Niagara's ultimate liability depends upon our resolution of the limitation of liability issue, we will first resolve the issue of limitation of liability.

The Limitation of Liability Act of 1851, 46 U.S.C. § 183(a), provides that in the event of an accident "done, occasioned, or incurred, without the privity or knowledge" of the vessel owner, the liability of the owner shall not exceed the value of the vessel. To determine the entitlement to limitation, the court must find what acts of negligence caused the accident. Second, the court must determine whether the vessel owner had knowledge or privity of those acts, in order to grant or deny limita-

tion. *Farrell Lines, Inc.* v. *Jones,* 530 F.2d 7, 10 (5th Cir. 1976), *reh'g denied,* 532 F.2d 1375 (5th Cir. 1976). In the context of the corporate shipowner, as we have here, the privity and knowledge scrutiny focuses not only on what the corporate owner knows, but also on what the corporate owner should have known. *Tittle* v. *Aldacosta,* 544 F.2d 752 (5th Cir. 1977), *reh'g denied,* 546 F.2d 906 (5th Cir. 1977); Gilmore and Black, *The Law of Admiralty* 886 (2d ed. 1975).

The district court found that Thomas, the owner of the water boat CHIPPY, was unaware of the operator's negligence in pumping the water into the hydraulic oil tank, and that Thomas was not on board the CHIPPY when the pumping occurred. That analysis is not sufficient to determine the issue, for

> An owner cannot close its eyes to what prudent inspection would reveal. An owner must avail itself of whatever means of knowledge are reasonably necessary to prevent conditions likely to cause losses. "If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners would be at a premium."

Waterman S.S. Co. v. *Gay Cottons,* 414 F.2d 724, 732 (9th Cir. 1969), *quoting The Argent,* 1940 A.M.C. 508, 509 (S.D.N.Y. 1915).

Rather, the court must determine whether the shipowner had knowledge of the "acts of negligence or conditions of unseaworthiness." *Farrell,* 530 F.2d at 10. Undoubtedly, Thomas, as well as high managerial personnel, Clifford Davignon, the managing agent of the waterboat, knew of the pumping accident well before Joia suffered his injuries. Mahoney called Davignon and told him of the accident. Davignon contacted Thomas at approximately 7:00 a.m. and told him of the accident. Thomas informed Davignon to clean up the mess the "best way he could." Davignon posted no warning signs, failed

to inform Joia or others of the accident, and returned to the engine deck some three hours later, after Joia had injured himself.

This is not a case where the vessel is at sea and the owner is unaware of emergencies, thus having to rely on his master. Instead, the vessel was docked, and the owner, as well as management, was within calling distance for any eventuality. It was Thomas who gave the directions to make the vessel seaworthy. Merely because Thomas did not watch the pumping accident, does not prevent him from having privity or knowledge of the circumstances which made the vessel unseaworthy. As the above facts clearly show, Thomas was aware of the accident very shortly after it occurred. Because of this lack of due diligence, the dangerous condition remained to the peril of others, including Joia.

> [W]here the circumstances are such that the owners or managing agents have a duty to act to see that the vessel is made seaworthy, a neglect or failure to take such action will require denial of limitation. Mere instructions to subordinate employees will not suffice to give the owner the benefit of the limitation act.

States S.S. Co. v. *United States*, 259 F.2d 458, 472 (9th Cir. 1957), *cert. denied*, 358 U.S. 933, 79 S.Ct. 316, 3 L.Ed.2d 305 (1959). The Supreme Court discussed the privity or knowledge of a boat owner in an analogous situation in *Spencer Kellogg and Sons, Inc.* v. *Hicks*, 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903 (1932). Spencer Kellogg operated a factory on the New Jersey side of the Hudson River. It owned a launch which it used to ferry employees to and from New York City across the Hudson. The launch was not seaworthy when ice

was in the river, and so the owner had instructed the manager of the factory, Stover, to not allow the launch to be used when ice was in the river. Stover so instructed the launch operator. Despite this instruction, on a day when there was ice in the river the launch was used, which resulted in an accident wherein lives were lost. The owner of the launch, Spencer Kellogg, sought to limit its liability, claiming it had no knowledge or privity with the negligent acts of the launch operator. The Supreme Court rejected this argument and found that the launch owner could properly be charged with knowledge or privity. The Court observed:

> The argument is that as the boat was seaworthy when there was no ice and instructions had been given to a competent master not to run her through ice, the owner did its full duty and cannot be held responsible as having privity or knowledge of a violation by the master of these explicit instructions. Cases such as *La Brougogne*, 210 U.S. 95, 28 S.Ct. 664, 52 L.Ed. 973, which involved the master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment. The conditions on the morning in question could have been ascertained by

> Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's privity or knowledge.

Spencer Kellogg, 285 U.S. 511-12, 28 S.Ct. at 453. *Cf. Napoli* v. [*Transpacific Carriers Corp. and Universal Cargo Cariers, Inc.*] *Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976). Under the circumstances of this case, Jo-Ja is held to have privity and knowledge as a matter of law and is therefore not entitled to limit its liability.

As noted above, Niagara contends that the judgment entered against it should not exceed the proportionate degree of fault assessed by the jury. The jury did not assess three separate proportionate values of fault on each count. Rather, it placed one set of fault values against the parties for all three counts.

Niagara argues that liability should be entered not jointly and severally, but on the basis of responsibility. We understand its concern. Had we ruled that Jo-Ja was entitled to limit its liability, it would have faced a judgment of $292,000.00, an amount substantiality greater than its proportionate share of liability assessed by the jury, 30%, or $108,000.00. He argues, therefore, that this court should abolish or limit joint and several liability. His argument, however, must fail because the two bodies of law governing this case, maritime law and state common law of negligence, both provide that the defendants in this litigation are jointly and severally liable for the plaintiff's losses.

a) *Massachusetts Common Law*

Under joint and several liability, the plaintiff is entitled to collect only the amount of the judgment, although he may recover any part or all of the judgment from one or more of the tortfeasors. The effect of joint and several liability is that

each defendant is liable for the entire amount of damages to the plaintiff. Generally, the joint tortfeasor who pays more than his pro rata share of the judgment has a right of contribution over against the other joint tortfeasors for the excess.

Under Massachusetts law, joint tortfeasors are jointly and severally liable for a plaintiff's damages. *Feneff* v. *Boston & Maine R.R.*, 196 Mass. 575, 82 N.E. 705 (1907). "If two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable." *Feneff*, 196 Mass. at 581, 82 N.E. at 707. When two or more defendants are held jointly and severally liable, the amount of the judgment is the same against all joint tortfeasors. *Delfino* v. *Torosian*, 354 Mass. 395, 237 N.E.2d 694 (1968). Under Massachusetts statutory law, a joint tortfeasor who pays more than his pro rata share of the judgment has an action for contribution against the other joint tortfeasors. Mass. Gen. L. ch. 231B. However, proportionate share of liability is determined not upon the relative degrees of fault, but by the number of joint tortfeasors involved. *MacLachlan* v. *Brotherhood Oil Corp.*, 10 Mass. App. 811, 404 N.E.2d 1272 (1980).

b. *The Law Under the Jones Act and General Maritime Law*

Joia argues that under the Jones Act and the general maritime law, joint tortfeasors are jointly and severally liable for a seamen's personal injuries, regardless of the defendants' degrees of fault. *Edmonds* v. *Compagnie Generale Transatlantic*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979); *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). Niagara, on the other hand, contends that admiralty law has long recognized a proportionate fault rule, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975); *Leger* v.

Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979), or that, in the alternative, this court should recognize a proportionate fault rule in maritime cases involving personal injuries to seamen. We examine these contentions in light of the existing law.

In *Reliable Transfer*, the Supreme Court overruled the mutual fault rule established in *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170, 15 L.E. 233 (1855), and substituted a rule requiring that liability for damages be allocated when possible in proportion to the relative fault of each party. The mutual fault or equal contribution rule, which was the law in admiralty collision cases for over a century prior, required that property damage by equally divided whenever two or more parties were at fault, regardless of the relative degrees of fault.

In abolishing the rule, the Court noted that every major maritime nation had since discarded it and replaced it with the rule of comparative fault. *Reliable Transfer*, 421 U.S. at 397-98. The divided damages rule rested on the assumption that it provided "rough justice," because a determination of fault was difficult to measure. The Court stated that the rule was no longer viable in those instances where a determination of fault could be made in a particular collision, but that there are occasions when degrees of fault cannot be calculated. A comparative negligence rule, moreover, would induce vessel owners to be more careful and deter them from harmful conduct that would result in greater liability. The Court's holding was clear:

> We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such

> damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Reliable Transfer, 421 U.S. at 411. The Court's holding was limited to collision cases involving property damage. Furthermore, there was no indication that the comparative fault rule should apply to a situation other than a maritime collision or stranding.

In *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), the Fifth Circuit extended the proportionate fault rule of *Reliable Transfer* to a noncollision personal injury case involving a seaman, stating that "[t]he reasoning of *Reliable Transfer* loses none of its cogeny in the context of a non-collision personal injury case." 592 F.2d at 1249. In *Leger*, an injured seaman brought suit against the defendants, under the Jones Act and under general maritime law. After two trials, the jury assigned comparative fault percentages against the parties, and awarded the seaman damages for his personal injuries. The award of damages came after the plaintiff settled with two of the three defendants. In fact, the two defendants settled for damages higher than their proportionate fault as assessed by the jury. As it then existed, if the non-settling defendant paid damages proportionate to his fault, the plaintiff would recove an amount higher than the jury award. He therefore sought on appeal to reduce his damages to an amount lower than his comparative fault. He was seeking in effect, a dollar-for-dollar credit of the amounts the plaintiff received in settlement. The Fifth Circuit rejected this argument, and held that the nonsettling defendant must pay his portion of the total damages of the jury award proportionate to his percentage of negligence. *Leger*, 592 F.2d at 1248-50. In so holding, the court based its decision on *Reliable Transfer* and *Cooper Stevedoring Co.* v. *Kopke*, 417 U.S. 106, 94 S.Ct. 2174, 40

L.Ed.2d 694 (1974), which allowed contribution in noncollision maritime cases, but left open the issue of division of damages. Furthermore, the *Leger* court saw this approach as encouraging settlements. Neither did the seaman enjoy a double recovery. Instead, it considered the plaintiff to have received a favorable settlement. We decline to take this approach for the following reasons.

We believe that *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), thought not controlling, states the admiralty rule applicable here. The plaintiff, a longshoreman, while employed by a stevedore, was injured while working on a vessel. He recovered statutory benefits from his employer under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. ("Act"). He later brought a direct action in negligence against the shipowner pursuant to § 905(b) of the Act. The jury found the shipowner 20% negligent, the stevedore-employer 70% negligent, and the plaintiff 10% negligent. Upon entering judgment, in accordance with maritime law, the district court ruled that the shipowner was liable for all the damages not due to the plaintiff's own negligence. In other words, though the shipowner was 20% negligent, it was liable for the employer's negligence for a total of 90% of Edmond's damages. The Fourth Circuit reversed, holding that 1972 amendments to the Act required the imposition of a proportionate fault rule whereby the shipowner was liable only for the share of damages assignable to its fault. The Supreme Court reversed the appeals court, holding that the 1972 amendments did not alter the traditional maritime rule that, in a longshoreman's suit against a shipowner, while the award may be reduced by the plaintiff's negligence, the shipowner is responsible to the longshoreman for the remainder of the award, even if the negligence of the stevedores contributed to the injury. *Ed-*

monds, 443 U.S. at 272. The Court stated that Congress intended the 1972 amendments to eliminate both the shipowner's warranty of seaworthiness to the longshoreman and the stevedore's warranty of workmanlike service to the shipowner. *Edmonds*, 443 U.S. at 263. In dealing with the mixture of a statutory and judge-made loss allocating mechanism, the Court stated that this maritime rule applicable to a longshoreman's tort action is consonant with the common law rule.

> This . . . rule is in accord with the common law, which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.

443 U.S. at 261. Manifestly, while the narrow holding of *Edmonds* does not govern a seaman's action, the rule applied there is the same as the rule applicable here.[3]

The Court recognized the inequitable burden in shipowner must shoulder, but held a stronger distaste for the unfairness a proportionate fault system would create against the longshoreman in light of the remedial purpose of the Act. 443 U.S. at 271. The loss allocating mechanism employed in *Edmonds* and the 1972 amendments are intended to compensate an injured longshoreman as fully as possible for the damages suffered.

We agree with the decision in *Ebanks* v. *Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983),

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[3] The Court cited the Restatement (Second) of Torts § 886 that "under traditional tort law, a plaintiff obtaining a judgment against more than one concurrent tortfeasor may satisfy it against any one of them." *Id.* at 261 n.8.

which held that in a maritime negligence action, it was error for the trial court to submit to the jury special interrogatories to determine the comparative degrees of fault between a defendant and a non-party. *Ebanks*, 688 F.2d at 722. The court relied on the *Edmonds* decision in holding that since the plaintiff may receive against either of several joint tortfeasors, the comparative degrees of fault is irrelevant. *Id*. Furthermore, a paying defendant has a right of contribution against a non-paying entity that may be decided in a different proceeding. *Id*.

The joint and several loss allocating mechanism which serves to provide an injured seaman his full judgment is consonant with the policy behind the Jones Act, to provide protection to seamen who are victims of negligence. *Cosmopolitan Shipping Co*. v. *McAllister*, 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692 (1949); *see also Bennet* v. *Perini Corp*., 510 F.2d 114, 117 (1st Cir. 1975) (Jones Act is to be construed remedially). The policy underlying the remedial nature of the Jones Act and the general maritime law necessitates our adherences to the joint and several rule. The rationale behind *Reliable Transfer*, which involved property damages, and a seaman's action, which involves personal injury, are not the same. The comparative fault rule of *Reliable Transfer* is designed to achieve a fair assessment of damages against each party according to their degrees fault and to deter harmful conduct of vessels. That rationale loses its strength in a seaman's tort action. If comparative fault were the rule, an injured seaman might have to bear damages higher than his degree of fault, for example in a case where a tortfeasor is insolvent and/or he or another tortfeasor has limited his liability according to the limitation act. Assuming in this case that Jo-Ja were entitled to limited liability, it would be liable for $50,000.00 in damages, and Niagara would be liable for $100,000.00 in damages. On a $360,000.00 judgment, Joia would bear $202,000.00 in damges, or 51% of the jury award, where he was only 5% at fault.

While the result we reach today may seem inequitable to a defendant, including Niagara, ultimately, in a contribution proceeding, it will be liable according to its degree of fault. Contribution between joint tortfeasors in admiralty is according to comparative fault. *Maritime Overseas Corp.* v. *Northeast Petroleum Indus.*, 706 F.2d 349, 355 (1st Cir. 1983). Therefore, in this case if Niagara were to pay a disproportionate share of the judgment, it could seek contribution against Jo-Ja, and no inequities would result to either party. Admittedly, assuming again that Jo-Ja successfully limited liability, under the joint and several rule, Niagara would bear a larger, disproportionate share of the damages. But the Supreme Court made clear in *Edmonds* that the seamen should not suffer this inequity.

> Under the Court of Appeal's proportionate fault rule, however, there will be many circumstances when the longshoreman will not be able to recover in any way the full amount of his damages determined in his suit against the vessel. If, for example his damages are at least twice the benefits paid or payable under the Act and the ship is less than 50% at fault, the total of his statutory benefits plus the reduced recovery from the ship will not equal his total damages.

443 U.S. at 270. Moreover, the Court stated that in the Longshoremen's and Labor Worker's Compensation Act, Congress did not intend to place the burden of the inequity on the Longshoreman, "whom the Act seeks to protect." *Id.* at 270. Likewise, we do not find that Congress in enacting the Jones Act intended to place this similar burden on an injured seaman.

Niagara argues that this court should, in any event, follow the trend towards the adoption of comparative negligence. While we decline this invitation, the comparative negligence

system has its merits in a case where one tortfeasor incurs minimal negligence, and the other tortfeasors are insolvent, enjoy limited liability, or are otherwise protected by operation of law, or in instances where the plaintiff incurs substantial contributory negligence. However, the decision whether to continue this trend is more properly before a legislature.

We hold that defendants Niagara and Jo-Ja are jointly and severally liable to plaintiff in the amount of $342,000.00 and that plaintiff bears the loss of $18,000.00, representing 5% negligence assigned by the jury.

V. *Jury Award for Damages for Pain and Suffering*

Niagara contends that the jury award of $250,036.00 for damages for pain and suffering is unsupported by the evidence and is excessive, and the district court improperly denied its motion for a remittitur or a new trial on damages. On appellate review, a jury's award will be set aside only when it is so excessive "that the district court's refusal to order a new trial constitutes a manifest abuse of discretion." *Rivera* v. *Rederi A/B Nordstjernan,* 456 F.2d 970, 975 (1st Cir. 1972), *cert. denied,* 409 U.S. 876, 93 S.Ct. 124, 34 L.Ed.2d 128 (1972). The jury's verdict must stand unless it is "grossly excessive" as "shocking to the conscience." *LaForest* v. *Autoridad de las Fuentes Fluviales de Puerto Rico,* 536 F.2d 443, 447 (1st Cir. 1976). The reviewing court is constrained to view the evidence in the light most favorable to the plaintiff. *Betancourt* v. *J.C. Penney Co. Inc.,* 554 F.2d 1206, 1207 (1st Cir. 1977). We now turn to the evidence in the record.

In the August 1, 1983 fall, Joia injured both his back and his right testicle; prior to the injury he had problems with an enlarged testicle and was treated by a chiropractor for back problems although the extent of these prior conditions was not clear. While the pain in his testicle disappeared within min-

utes, after six days his testicle began to swell, and he consulted a urologist. After finding blood in his bladder, the urologist performed a cystourethrascopy on August 21, 1983. Joia testified that he was nervous about the scope being introduced into his penis, and he suffered a burning sensation after the operation. A different doctor operated on his groin in September of 1983. Joia testified that he was nervous about the operation, and that he was worried about the effects of the operation. In all, two operations were performed on his testicle, both resulting in pain and anguish. It is entirely understandable that a young, married man may have considerable anxiety and mental distress over the possible consequences of surgery on his reproductive organs.

Moreover, Joia suffered great pain in his back immediately after the accident, and his wife had to help him off the vessel. He sought treatment from a chiropractor on the day of the accident, who treated him for a period of one month; during the time he experienced severe pain. He consulted another chiropractor, during which time he was in greater pain than before. He then consulted an orthopedist, who conducted an EMG. Another doctor conducted a myelogram, which required a one-week hospital stay, and during that stay he was placed in traction. Between July 30, 1984 and August 8, 1984, he was hospitalized for a laminectomy. This treating doctor, Dr. Ciminello, testified to the pain Joia experienced during this treatment.

In January 1985, Joia underwent a second myelogram for incontinence associated with his back injury; he felt ashamed for having wet his bed. He underwent a second cystoscopic examination. Joia also testified that since January, 1985, he has felt discomfort in his back and that his right foot is constantly numb. Dr. Ciminello confirmed that scar tissue remaining from the laminectomy might account for the discomfort in his back.

In substance, there was ample testimony that Joia experienced bouts of pain and humiliation during the year and one-half since the accident. Furthermore, there was evidence that Joia can no longer participate in family activities, including athletics and dancing.

Under our standard of review, we cannot say that, on the evidence and testimony presented, the jury award for pain and suffering was "grossly excessive," "shocking to the conscience," nor can we say that the court's refusal to order a new trial was a "manifest abuse of discretion." Concededly, while the award is very high, the total net award was reduced by the $18,000.00 attributed to the 5% negligence of Joia.

VI. *Crossclaims*

Niagara's final contention is that the district court committed reversible error in failing to instruct the jury regarding its crossclaims against Jo-Ja for tort and contract indemnity. Under a theory of tort indemnity, between joint tortfeasors the whole loss may be shifted to the more guilty of the tortfeasors. *Araujo* v. *Woods Hole, Martha's Vineyard, Nantucket Steamship Authority*, 693 F.2d 1, 3 (1st Cir. 1982). A contractual right to indemnity may arise if there are "unique special factors demonstrating that the would-be indemnitor bear the ultimate responsibility for the plaintiff's safety . . . or where there is a generally recognized special relationship between the parties." *Araujo*, 693 F.2d at 2-3 (citations omitted).

The record shows that Niagara failed to make a timely objection to the court's failure to give the instructions. Rule 51 states in pertinent part:

> No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

> Opportunity shall be given to make the objection out of the hearing of the jury.

Fed. R. Civ. P. 51. This Court has previously stated the rationale behind the rule:

> The object of the rule is to afford the trial judge an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge. The rule also serves to lessen the potential burden of appellate courts by diminishing the number of rulings at the trial which they may be called upon the review.

Marshall v. *Nugent,* 222 F.2d 604, 615 (1st Cir. 1955).

The record below reveals that after the second day of trial, the trial court stated to counsel that "I think everything has to go to the jury, which includes your two crossclaims." In response, Niagara submitted four questions regarding tort and contract indemnity in the verdict forms. During jury instructions, the trial court explained that Niagara had its claims against Jo-Ja, but did not specifically instruct the jury regarding the crossclaims for tort and contract indemnity. After the trial court finished reading the special verdict questions, it stated in open court: "Now, let me ask counsel, before I excuse the alternates, if they have anything to add?" Thereafter, at the bench and out of the presence of the jury, counsel for Niagara made on objection regarding the court's refusal to read its proposed instructions 9 through 16, which dealt with the *Peymann* issue. Niagara made no objection regarding the omission of the crossclaims from the special verdict forms. The jury then retired to deliberate.

Niagara objected to this omission three months after the jury verdict, at the limitation of liability hearing on August 7, 1985.

Manifestly, Niagara's objection was not timely under Rule 51. These are precisely the circumstances that Rule 51 addresses. *Marshall* v. *Nugent, supra*. The trial court gave counsel ample opportunity to object to omissions in the special verdict form, and counsel for Niagara made none regarding this issue. Moreover, it may not rely on statements by the trial court prior to its conclusion of jury instructions as an excuse for its neglect. *See, e.g. DeHues* v. *Western Electric Co.*, 710 F.2d 1344 (8th Cir. 1983).

As to tort indemnity, along with its procedural problem under Rule 51, Niagara's active negligence precluded it from recovering against Jo-Ja under that theory beyond its percentage of negligence as found by the jury. "Where the party seeking indemnification was itself guilty of acts or omissions proximately causing the plaintiff's injury, tort indemnification is inappropriate." *Arauso*, 693 F.2d at 3. Niagara could not have recovered under a theory of tort indemnity.

Affirmed in part, reversed in part.

Appendix B.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 85-1753

FRANCISCO JOIA,
Plaintiff, Appellee,

v.

JO-JA SERVICE CORP.,
Defendant, Appellee.

BOAT NIAGARA FALLS, INC.,
Defendant, Appellant.

JUDGMENT

Entered: May 1, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part and reversed in part in accordance with the opinion filed this day.

Appellee Joia's cost shall be borne one half by Boat Niagara Falls, Inc., and one half by appellee Jo-Ja Service Corp.

By the Court:

/s/Francis P. Scigliano
Clerk.

Appendix C.

United States Court of Appeals
For the First Circuit

No. 85-1753

FRANCISCO JOIA,
Plaintiff, Appellee,

v. Rec. June 18, 1987

JO-JA SERVICE CORP.,
Defendant, Appellee.

BOAT NIAGARA FALLS, INC.,
Defendant, Appellant.

Before
CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER, TORRUELLA, SELYA,
Circuit Judges, and PIERAS,* *District Judge*.

ORDER OF COURT
Entered: June 17, 1987

The panel of judges that rendered the decision in this case having denied the petitions for rehearing submitted by appellant, Boat Niagara Falls, Inc. and by the appellee Jo-Ja Service Corp, and their suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that both petitions for rehearing and the suggestions for rehearing en banc be denied.

By the Court,
/s/Francis P. Scigiliano
Clerk

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* Of the District of Puerto Rico, sitting by designation.

Appendix D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRANCISCO JOIA,
Plaintiff

Civil Action
84-731-MA

Vs.

BOAT NIAGARA FALLS, INC.,
and JO-JA SERVICE CORP.,
Defendants

MEMORANDUM AND ORDER
ON JUDGMENT

Mazzone, D.J. August 30, 1985

This case, brought pursuant to the Jones Act, 46 U.S.C. § 688, and a pendent state law claim, is now before the Court for a determination of the defense of limitation of liability and for entry of judgment in accordance with this decision and the jury verdict returned on May 14, 1985. This case was tried to a jury, resulting in a verdict for the plaintiff. On the complaint and cross-claim, the jury found that the plaintiff was 5% negligent, and the defendant Boat Niagara Falls, Inc. was 30% negligent, and the defendant Jo-Ja Service Corp. was 65% negligent. The jury further found the plaintiff's damages to be $360,000 and it specifically allocated this amount as follows: $44,000 for past wages; $65,964 for lost future earnings; $250,036 for pain and suffering. The jury awarded prejudgment interest at the rate of 10%. At a subsequent hearing, the defendant presented its limitations of liability defense.

Were it not for the defense of limitation of the liability of Jo-Ja Service Corp., judgment would enter jointly and severally against the defendants in the amount of three hundred forty two

thousand dollars ($342,000) on Counts I, II and V. *See Maritime Overseas Corp.* v. *Northeast Petroleum Industries, Inc.*, 706 F.2d 349, 355 (1st Cir. 1983) ("Contribution between joint tortfeasors in a maritime action for personal injuries is proper where, as here, *neither tortfeasor's liability is limited by statute*") (emphasis added). *See also Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n.8 (1976). Further, on the cross-claims of the defendants, the issues having been tried and decided by the jury, liability would have been allocated as one hundred eight thousand dollars ($108,000) against the defendant Boat Niagara Falls, Inc., and two hundred thirty four thousand dollars ($234,000) against the defendant Jo-Ja Service Corp.

Prejudgment interest at the rate of 10% is allowed from August 1, 1983 on the $44,000 past lost wages component only of the jury verdict. No interest is awarded for the other components of the damage award. *Pino* v. *Protection Maritime Insurance Co.*, 490 F.Supp. 277, 280 (D.Mass. 1980).

Jo-Ja Service Corp. has filed a motion to limit its liability pursuant to 46 U.S.C. § 183. Under that statute, a vessel owner may limit his liability of the value of the vessel by proving that he had no "privity or knowledge" of the cause of the plaintiff's injuries. *See generally Coryell* v. *Phipps*, 317 U.S. 406 (1943). Where, as here, the defendant is a corporation, liability may be limited to the value of the vessel if the defendant proves that its managing agents and officers were without privity or knowledge as to the cause of the plaintiff's injuries. *Id.* at 410-12. In this context, privity or knowledge ". . . is a term of art complicity in the fault that caused the accident . . ." *Petition of United States Dredging Corp.*, 213 F.Supp. 780, 784 (E.D.N.Y. 1963).

In determmining whether the Jo-Ja Service Corp.'s liability should be limited to the value of the vessel, I am bound by the jury's determination that its negligence contributed to Joia's injury. *Murray* v. *New York Central Railroad Co.*, 287 F.2d

152, 154 (2nd Cir. 1961), *cert. denied*, 366 U.S. 945 (1961). *See also In re Double D. Dredging Co.*, 467 F.2d 468, 469 (5th Cir. 1972); *Petition of Trawler Weymouth, Inc.*, 223 F.Supp. 161, 163 (D.Mass. 1961); Gilmore & Black, *Law of Admiralty*, (2d ed. 1975) §§ 10-19, at 874.

The evidence clearly supports a conclusion that Jo-Ja's employee, Michael Mahoney, the operator of the waterboat CHIPPY, negligently filled the hydraulic oil tank instead of the water tank, causing the overflow onto the engine room deck where the plaintiff slipped and was injured.

The defendant is entitled to limit its liability to the value of the vessel, therefore, if the preponderance of the evidence establishes that no corporate officer or managing agent of the Jo-Ja Service Corp. had privity or knowledge of the actions of the vessel's operator. Here, it is the privity or knowledge of Thomas L. Thomas, the owner of the CHIPPY, that is at issue. I find that Thomas did not have privity or knowledge of Michael Mahoney's negligence in pumping water into the hydraulic oil tank. The evidence showed that Thomas was not on board the CHIPPY when the accident occurred, and it is settled that the privity or knowledge of the captain of a vessel about his own acts of negligence occurring at sea is not imputed to the vessel's owner.[1] *See, e.g., Complaint of Bankers Trust Co.*, 651 F.2d 160, 169 (2nd Cir. 1981); *Agrico Chemical Co.*, v. *S/S Atlantic Forest*, 620 F.2d 487, 489 (5th Cir. 1980), *aff'd*, 459 F.Supp. 638, 648 (E.D.La. 1978); *Petition of Kinsman Transit Co.*, 338 F.2d 708, 715-16 (2nd Cir. 1964), *cert. denied sub nom., Continental Grain Co.* v. *City of Buffalo*, 380 U.S. 944 (1965); *McDonald* v. *The 202*, 194 F.Supp.

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[1] 46 U.S.C. § 183(e) provides that the knowledge of privity of the vessel's master ". . . at or prior to the commencement of the voyage . . ." shall be imputed to the vessel owner. This section is not relevant here, as the cause of the plaintiff's injuries was an action taken after the voyage commenced.

383, 390 (S.D.Ala. 1961). *Compare Continental Oil Co.* v. *Bonanza Corp.*, 677 F.2d 455, 467-68 (5th Cir. 1982).

On the evidence presented at trial and after further hearing on August 7, 1985, I find that Thomas, the owner of the CHIPPY, was not complicit in the fault that caused Joia's injuries. I therefore rule that the defendant, Jo-Ja Service Corp., is entitled to limit its liability to the value of the vessel, which the parties have stipulated is $50,000.

Accordingly, judgment will enter for the plaintiff, Francisco Joia, in the amount of $342,000.00 against the defendant, Jo-Ja Service Corporation, in the amount of $50,000.00 and against the defendant, Boat Niagara Falls, Inc., in the amount of $292,000.00 with prejudgment interest at the rate of 10% per annum on $44,000.00 only, from August 1, 1983.

SO ORDERED.

/s/A. David Mazzone
United States District Judge

Appendix E.

JUDGMENT IN A CIVIL CASE

United States District Court

District of Massachusetts

FRANCISCO JOIA,
Plaintiff

v. CIVIL ACTION NO. 84-0731-MA

BOAT NIAGARA FALLS, INC., ET AL
Defendants

☑ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial to hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

in accordance with the jury verdict on May 14, 1985, the stipulation of dismissal of Count III filed on May 29, 1985 and the Court's memorandum and order dated August 30, 1985, judgment for the plaintiff, Francisco Joia, in the amount of $342,000.00, against the defendant, Jo-Ja Services Corporation in the amount of $50,000.00 and against the defendant, Boat Niagara Falls, Inc., in the amount of $292,000.00 with prejudgment interest at the rate of

10% per annum from August 1, 1983 on $44,000.00 only in the amount of $9,338.75 for a total of $301,338.75 against the defendant, Boat Niagara Falls, Inc.

APPROVED:

/s/ A. David Mazzone
United States District Judge

NOTE: The post judgment interest rate effective this date is 7.91%

CLERK
GEORGE F. McGRATH

DATE
Sept. 16, 1985

(By) DEPUTY CLERK
/s/ Helen M. Costello